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April 27, 2022

Honorable Ken Paxton
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

VIA: CERTIFIED MAIL

RE: Public Information Request of Chris Noel Carlin

Attorney General Ken Paxton:

On April 7, 2022, Fort Bend County Attorney, Bridgette Smith-Lawson, submitted to your office a request to ascertain whether certain records are excepted from public disclosure. Therein, **Fort Bend County asserts several arguments against disclosure of the requested records.** On April 20, 2022, third-party, Election Systems & Software (ES&S), also submitted to your office a response asserting several arguments against disclosure of some records. Please let this letter serve as Requestor's partial response in favor of disclosure and request for additional time to brief issues raised by ES&S.

1. Public Interest

On September 23, 2021, the office of the Texas Secretary of State announced a full forensic audit of the November 2020 General Election in Collin, Dallas, Harris, and Tarrant counties. The purpose of an audit of the general election is to maintain the accuracy and integrity of our election process, and to determine whether updates are advisable to achieve this goal. The Texas Secretary of State has a particular role to play in maintaining the accuracy of the statewide voter registration database, assessing gaps in security, and completing partial recounts of the electronic voting system ballots.

The proper functioning of a governmental system, however, requires more than the self-reflecting, self-policing role of one governmental entity inspecting another governmental entity. It also requires the inspection of the government itself by the people from whom the government derives its authority. Indeed, it is the fundamental philosophy of the American constitutional form of representative government that the government is the servant and not the master of the people.¹ It is the policy of the State of Texas that each person is entitled to complete information

¹ Texas Government Code Section 552.001.

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about the affairs of government, and about the official acts of public officials and employees at all times.²

The people have delegated their authority to the governmental entity and do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.³ The people do not give their public servants the right to decide what is too burdensome, or too expensive, to determine.⁴ The people insist on remaining informed so that they retain control over the instruments they created.⁵ Accordingly, any rule requiring public disclosure of information shall be, must be, and is, *liberally construed in favor of granting a request for information*.⁶

This fundamental policy, that the people are the master of the government, is nowhere more important than in the election of public officials as representatives of the people, and as stewards of the public's trust in the governmental entities they represent. This fundamental policy is carried forward by our Texas Legislature, and specifically applied to Texas elections, to ensure that the conduct of elections is uniform and consistent throughout the state to reduce the likelihood of fraud in the context of elections, and to ensure that all legally cast votes are counted.⁷ As representatives of the will of the people, our Texas Legislature has expressly provided for the strict construction of the Texas Election Code to effect the intent of uniform, fraud-free, and legal elections.⁸

2. Ballot Images

Fort Bend County cites to two letter rulings previously issued by Assistant Attorney General Nicholas A. Ybarra,⁹ and Assistant Attorney General Ramsey A. Abarca.¹⁰ Each of the letter rulings contains the language that the "ruling must not be relied upon as a previous

² Texas Government Code Section 552.001.

³ Texas Government Code Section 552.001.

⁴ Texas Government Code Section 552.267.

⁵ Texas Government Code Section 552.001.

⁶ Texas Government Code Section 552.001.

⁷ Texas Election Code Section 1.0015.

⁸ Texas Election Code Section 1.003(a-1).

⁹ OR2016-17163.

¹⁰ OR2017-16493.

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determination regarding any other information or any other circumstance."¹¹ Therein these letter rulings, a conclusion is made that they "have no indication the Election Code authorizes access to the voted ballot image at issue in [that] case. Thus, [that] information is not subject to disclosure under the Act until the preservation period has run."¹²

Please let this letter serve as a request for review of these two letter rulings, and a request that an official position on this matter be taken by your office. Specifically, we request a public opinion be made on whether voted ballot images are subject to immediate public disclosure for the purpose of litigating, if necessary, this question as a justiciable issue in a court of law.

The State of Texas' fundamental policy of the people's mastery over the government requires a mechanism for timely and meaningful review of the integrity of the process by which representatives are elected. The State of Texas' policy of an informed public that retains control over the instruments they created requires a mechanism for timely and meaningful review of the process by which representatives are elected. The State of Texas' policy of uniform, fraud-free, and legal elections requires a mechanism for timely and meaningful review of the process by which representatives are elected. Immediate access to voted ballot images is a necessary component in conducting a timely and meaningful review of the process by which representatives are elected.

Voted ballot images are subject to immediate release as "election records" as defined in Election Code Section 1.012(d) and as "documents or records generated by the [electronic voting] system" under Election Code Section 125.064, both of which being subject to public inspection under Texas Election Code Section 1.012(a).

Voted ballot images do not contain "confidential information" as excepted from disclosure by Texas Government Code Section 552.101. To the extent that any voted ballot images do contain confidential information, such information is only subject to a temporary delay for the purpose of redaction. In neither case, whether the voted ballot image contains confidential information or not, should the voted ballot images be withheld for the duration of either preservation / exclusion period of Texas Election Code Section 66.058(a) or (b).

3. Confidential Information

Fort Bend County cites to Open Records Decision No. 505 (1988) for support of the conclusion that precinct election records, including voted ballot images, should not be released during the preservation / exclusion periods of Texas Election Code Section 66.058(a) or (b). Open Records Decision No. 505 concludes that precinct election records are "confidential" as

¹¹ OR2016-17163 at 4; OR2017-16493 at 2.

¹² OR2016-17163 at 2; OR2017-16493 at 2.

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long as the precinct election records are required to be preserved pursuant to section 66.058 of the Election Code, and consequently precinct election records must be withheld as “confidential information” under Section 552.101 of the Government Code for the duration of the retention period. This line of reasoning is cited in both letter rulings of OR2016-17163 and OR2017-16493, as well, in support of withholding voted ballot images from immediate public disclosure. Each of these three decisions are based upon old law that has been superseded by changes in the Election Code and advancements in technology used to conduct Texas elections.

Texas Government Code Section 552.101, providing an exception to public disclosure for “confidential information,” states that information is excepted from public disclosure if it is “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Under current election law and procedures, and election law and procedures applicable to the general election of November 03, 2020, there is no constitutional, statutory, or judicial decision supporting a determination that “precinct election records” contain confidential information. And, to the extent that any “precinct election records” do contain any confidential information, then withholding such records is only authorized to the extent that time is reasonably necessary to redact the confidential information.

Precinct election records, including voted ballot images and any copies or scans of precinct election records, are immediately subject to public disclosure. To the extent precinct election records do contain confidential information, the images, scans, or copies are subject to public disclosure immediately after redaction. By changes in the nature of how Texas conducts its elections, and by the updates in election-related technology since 1988, precinct election records are now generally anonymous to which candidates any particular voter selected on their ballot, and are generally available for public disclosure without breach of either preservation / exclusion period provided for by Election Code Section 66.058(a) or (b).

Open Records Decision No. 505 reasons that preservation and retention of voted ballots is governed by Texas Election Code Section 66.058.¹³ Open Records Decision No. 505 further reasons that, pursuant to the requirements of preservation and retention, entry may only be made into those specified records as authorized by the Election Code.¹⁴ Open Records Decision No. 505 then states that, as a general rule no one may have access to voted ballots during the retention period, and the statutory exceptions for gaining access to voted ballots only include recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the Election Code.¹⁵ Open Records Decision No. 505 then concludes that “[d]uring the preservation period, the voted ballots are protected from required disclosure [as confidential

¹³ Open Records Decision No. 505 (1988), page 2.

¹⁴ Open Records Decision No. 505 (1988), page 2.

¹⁵ Open Records Decision No. 505 (1988), page 2 (footnote 2).

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information under the Texas Government Code] in conjunction with section 66.058 of the Election Code.”¹⁶

The reasoning in Open Records Decision No. 505 is erroneously extended to voted ballot images in OR2016-17163 and OR2017-16493, and all three opinions are mistakenly relied upon in this case to withhold from public disclosure the voted ballot images of the general election of November 03, 2020. Voted ballot images are collected as scans of the voted ballots and are not contemplated by the reasoning of Open Records Decision No. 505. Voted ballot images are merely copies of voted ballots retained for record-keeping as a feature of the electronic voting system.

Open Records Decision No. 505 reasons that, since no one may have access to voted ballots during the retention period of Section 66.058, the information is confidential. However, voted ballot images are separate and distinct from the voted ballots. Voted ballot images require a confidentiality analysis that is separate and distinct from the reasoning used by Open Records Decision No. 505. Voted ballot images are not protected from required disclosure as confidential information under the Texas Government Code in conjunction with Section 66.058 of the Election Code.

Records are not "confidential information" and excepted from public disclosure absent a constitutional law, a statutory law, or a judicial decision. Open Records Decision No. 505, alone, does not support a determination that voted ballot images are "confidential information" because it is not a constitutional law, a statutory law, or a judicial decision. Even if Open Records Decision No. 505 were determined to be a constitutional law, a statutory law, or a judicial decision, it would still be inapplicable to voted ballot images because voted ballot images are not the same as voted ballots. An extension of Open Records Decision No. 505 as a constitutional law, a statutory law, or a judicial decision, or the gratuitous extension of the reasoning contained therein, from voted ballots to voted ballot *images*, is both unsupported by the law and contrary to Texas public policy.

OR2016-17163 and OR2017-16493 falsely equate the concept of keeping voted ballots securely preserved with the conclusion that the voted ballot images are confidential. Open Records Decision No. 505 may conclude that voted ballots are confidential simply because they are securely preserved, but it is improper to conclude that voted ballot *images* are confidential because voted ballots must be securely preserved. Since this line of reasoning fails to provide an extension of Open Records Decision No. 505 to voted ballot images, separate support for a determination that voted ballot images are confidential information must be found in order to withhold voted ballot images from public disclosure.

¹⁶ Open Records Decision No. 505 (1988), page 2.

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There is no constitutional law, statutory law, or judicial decision that supports voted ballot images to be included under Texas Government Code Section 552.101 as "information considered to be confidential by law." The nature of anonymous voted ballots, and copies or images derived therefrom, requires that voted ballot images be publicly disclosed because they do not cause the secrecy of any person's vote to be revealed. To the extent that a voter's identifying information is present on a particular group of voted ballots, and copies or images derived therefrom, only a temporary withholding for the purpose of redaction is allowed by the Election Code and the Texas Government Code Chapter 552.

Election Code Section 66.058(a) requires preservation of precinct election records. A requirement to preserve precinct election records does not equate to a requirement to not disclose the content of the precinct election records. Texas Election Code Section 66.058(b) requires the voted ballots to be preserved securely in a locked room in the locked ballot box for a period of 60 days. A requirement to securely preserve the voted ballots in a locked room in the locked ballot box for 60 days does not equate to a requirement to not disclose the content of the voted ballots (by means of voted ballot images) or any other precinct election records.

Texas Election Code Section 66.058(b-1) requires that the ballot box or other secure container containing the voted ballots not be opened during the preservation period, except as permitted by the Texas Election Code. A requirement that the ballot box or other secure container containing the voted ballots not be opened during the preservation period, except as permitted by the Texas Election Code, does not equate to a requirement to keep the content of the voted ballots confidential.

In conclusion, Open Records Decision No. 505, OR2016-17163 and OR2017-16493 all determine voted ballots to be temporarily "confidential information" by reason of the Election Code requirement (presently codified as Section 66.058(b-1)) that the ballot box or other secure container containing the voted ballots not be opened during the preservation period, except as permitted by the Texas Election Code. Extension of the reasoning of Open Records Decision No. 505 from voted ballots to voted ballot images is faulty and unsupported by law, logic, and Texas policy. Voted ballot images must be publicly disclosed immediately to the extent that the image itself does not contain any confidential information, and may only be withheld to the extent necessary to redact confidential information contained in the images.

Similarly, precinct election records do not become confidential information simply because precinct election records are required to be preserved, because voted ballots are required to be securely preserved, or because a ballot box or other secure container containing voted ballots may not be opened during the preservation period, except as permitted by the Election Code. Precinct election records, excluding voted ballots, must be publicly disclosed immediately to the extent that the precinct election records do not contain any confidential information (as justified by laws independent of 66.058(b-1)), and may only be withheld to the extent necessary

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to redact confidential information contained in the precinct election records. Any reasoning from a period of secure preservation of voted ballots that is used to make other precinct election records into "confidential information" is faulty and contrary to Texas public policy.

There is no constitutional law, statutory law, or judicial decision that supports voted ballots to be included under Texas Government Code Section 552.101 as confidential information. Access to the voted ballots should be determined by application of the two preservation / exclusion periods provided for in Election Code Section 66.058(a) and (b).

4. Preservation / Exclusion Periods

Open Records Decision No. 505 converts a requirement that voted ballots be securely preserved in a locked room inside of the locked ballot boxes for 60 days into a blanket rule of confidentiality of all precinct election records for 22 months of exclusion from access for any purpose other than election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the Election Code. Texas Election Code Section 66.058(b) provides for a 60-day window of opportunity for limited access to voted ballots securely preserved in a locked room in the locked ballot boxes, apart from the rest of the precinct election records. Texas Election Code Section 66.058(a) provides for a 22-month window of preservation to otherwise access the voted ballots along with the rest of the precinct election records. Open Records Decision No. 505 liberally, rather than strictly, construes ambiguity and vagueness in Election Code language to transform a 60-day secure preservation period for official use of voted ballots, into a 22-month exclusion of any public access to all precinct election records.

Such a broad extension of the language of Election Code Section 66.058 is erroneous for three important reasons: 1) Election Code policy specifically requires a strict construction of the provisions of the Election Code to reduce the likelihood of fraud in the conduct of elections; 2) the prohibition of access to the ballot box or other secure container containing voted ballots described in Section 66.058(b-1) is improperly extended to encompass all precinct election records; and 3) the time period of "during the preservation period," describing the length of time for which Section 66.058(b-1) should apply, is improperly extended to the 22-month preservation period described in Section 66.058(a) instead of the 60-day "preserved securely in a locked room in the locked ballot box" period described in Section 66.058(b).

The Texas Legislature specifically states the policy that the Election Code should be strictly construed to reduce the likelihood of fraud in the conduct of elections.¹⁷ By interpreting vagueness and ambiguity in Texas Election Code Section 66.058 to require a 22-month exclusion of any public access to all precinct election records, Open Records Decision No. 505 is increasing, rather than decreasing, the likelihood of fraud in the conduct of elections. The

¹⁷ Texas Election Code Section 1.003(a-1); Texas Election Code Section 1.0015.

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vagueness and ambiguity in Section 66.058, by expressed legislative intent,¹⁸ must be construed¹⁹ to include immediate public disclosure of the content of voted ballots (e.g. immediate disclosure of the ballot images), and access to the voted ballots for public inspection immediately after the expiration of the 60-day "preserved-securely" period of Section 66.058(b).

Section 66.058(b-1) only requires that "a ballot box or other secure container containing voted ballots" may not be opened during the preservation period, except as permitted by the Texas Election Code. Open Records Decision No. 505 is being used by OR2016-17163 and OR2017-16493 to extend a 60-day prohibition against opening the locked ballot box containing voted ballots²⁰ into a prohibition against public disclosure and inspection of all precinct election records as defined by Section 66.002.²¹ Section 66.058(b-1) is improperly extended and must be construed as limited only to the 60-day preserved-securely period of Section 66.058(b) and must be limited to allow for public inspection and disclosure during the 22-month preservation period of Section 66.058(a). Furthermore, "Public Inspection of Election Records," pursuant to Section 1.012 is an expressed permission of the Texas Election Code allowed by Section 66.058(b-1) regardless of whether (b-1) is limited to Section 66.058(b) only or erroneously extended to also include Section 66.058(a).

Section 66.058(b-1) requires that, "[e]xcept as permitted by this code, a ballot box or other secure container containing voted ballots may not be opened during the preservation period." The requirement specifically permits access as permitted by the Texas Election Code. The requirement specifically states "secure container" as is prescribed in Section 66.058(b), and the Section 66.058(b-1) section number designates itself as applicable to Section 66.058(b). Open Records Decision No. 505 fails to recognize "Public Inspection of Election Records" of Section 1.012 as being permitted under the Election Code, ignores the "secure container" designation of Section 66.058(b-1), and ignores any analysis of whether the preservation period of (b-1) refers to the 22-month preservation period described in 66.058(a) or the 60-day preservation period described in 66.058(b).

5. After Expiration of Preservation / Exclusion Periods

Open Records Decision No. 505, OR2016-17163, and OR2017-16493 all agree that, after the preservation period, precinct election records must be disclosed.²² However, according to

¹⁸ Texas Election Code Section 1.0015.

¹⁹ Texas Election Code Section 1.003(a-1).

²⁰ Texas Election Code Section 66.058(b).

²¹ OR2016-17163 at 2; OR2017-16493 at 2.

²² Open Records Decision No. 505 at 4; OR2016-17163 at 2; OR2017-16493 at 2.

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Section 1.013, "[a]fter expiration of the prescribed period for preserving [...] records that are preserved under this code, the records may be destroyed or otherwise disposed of unless [...] proceeding in connection with an election to which the records pertain is pending." The current standards expressed in Open Records Decision No. 505, OR2016-17163, and OR2017-16493 do provide that "records that otherwise become public on a given date may not be destroyed until the request for public inspection has been resolved,"²³ however, statutory law expressly allows for immediate destruction.

Section 1.013 is binding law, allowing for immediate destruction of the records after expiration of the preservation period, while Open Records Decision No. 505, OR2016-17163, and OR2017-16493 are merely advisory opinion or inapplicable letter rulings favoring a public right to inspection after the expiration of all preservation periods. This presents a suggested remedy without an actual means of enforcement for public inspection that is anything beyond a voluntary compliance by the governmental entity. Voluntary compliance is not the compliance contemplated by the Texas Legislature in Section 1.012's provision for Public Inspection of Election Records.

Section 1.012's provision for public inspection must be construed to mean an enforceable and meaningful right to immediate public inspection, and an enforceable and meaningful right to public inspection at all times throughout the preservation periods. Furthermore, Texas Government Code Section 552.321 must be construed liberally pursuant to the policy that the people insist on remaining informed so that they retain control over the instruments they have created.²⁴ Finally, the provision for Mandamus Relief in Government Code Section 552.321 must be construed to include mandamus to retain records prior to destruction (i.e. injunctive relief). Any argument that suggests an injunction against destruction of records by the governmental entity is a remedy only allowable for other governmental entities by Government Code 552.3215 must be immediately denounced if the right of public inspection is to have any meaningful purpose under the current mechanisms imposed by Open Records Decision No. 505, OR2016-17163, and OR2017-16493.

6. Software as Tool for Manipulation of Public Property

On April 20, 2022, third-party, Election Systems & Software (ES&S), also submitted to your office a response asserting several arguments against disclosure of some requested records relating to software and technological tools used in the general election of November 03, 2020. Therein, it is stated that your Office has already previously determined in Open Records Decision No. 581 (1990) that certain computer information has no significance other than its use

²³ Open Records Decision No. 505 at 4; OR2016-17163 at 2; OR2017-16493 at 2.

²⁴ Texas Government Code Section 552.001(a)-(b).

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as a tool for the maintenance, manipulation, or protection of public property.²⁵ By this reasoning it is concluded that certain computer information is not the kind of information made public under Texas Government Code Section 552.021.²⁶

A full response to each of the arguments put forth by ES&S is beyond the scope of this letter and, especially beyond the scope of the limited timeframe in which Requestor has to supply this counter-argument for consideration by your office. However, the policy that the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know is made meaningless by any decision that vote counting software is exempt from public scrutiny. When vote counting software is specifically described as a tool for the *manipulation* of public property, it is critical to the public policy of the State of Texas that such software be subject to public inspection. Public access to view a governmental representative's observation of the software is inadequate for such an important aspect of the election process.

Requestor hereby requests your office provide an additional period, not less than 14 days, of time by which Requestor may more fully brief and respond to the April 20, 2022 letter of ES&S.

7. Response to Fort Bend County Request for Clarification

A response to Fort Bend County's request for clarification is forthcoming and will be copied to your office when sent to Fort Bend County.

Conclusion

The public policy of the State of Texas is to liberally construe the Texas Public Information Act in favor of the people's insistence on remaining informed so that they retain control over the instruments they have created. The Texas Legislature has expressed intent, through the Texas Election Code, that elections be uniform and consistent throughout this state to reduce the likelihood of fraud in the conduct of elections and to ensure that all legally cast ballots are counted. The Texas Secretary of State has embarked on a forensic audit of the results of the general election of November 03, 2020, and the people of Texas have committed themselves to the same.

We are requesting a public order updating the Texas Attorney General's position of issues in law and technology that have changed since Open Records Decision No. 505 (1988). We have written, in detail, of how Open Records Decision No. 505 was improperly extended to voted

²⁵ ES&S Letter of April 20, 2022, page 1.

²⁶ ES&S Letter of April 20, 2022, page 1.

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ballot images, and we have requested additional time to brief the arguments raised by ES&S. We believe that an evaluation of Open Records Decision No. 505, and the letter rulings of OR2016-17163 and OR2017-16493, is now appropriate to determine the extent of their application to current law and election-related technologies and procedures.

Precinct election records are neither confidential information nor required to be kept in a locked container with voted ballots for a 22-month exclusion period. The people are not excluded from access to voted ballots, voted ballot images, or other election records until the moment they are legally permitted to be destroyed, and the right to enjoin the destruction of those records is not solely in the hands of a governmental unit. Computer software, designed to manipulate the votes of the people, is subject to meaningful public inspection. Accordingly, each of these truths must be meaningfully upheld in order to effectuate the public policies of Texas.

We submit to you this letter in favor of immediate disclosure of ballot images. We submit to you this letter in favor of immediate disclosure of precinct election records, aside from the voted ballots. We submit to you this letter in favor of public inspection of voted ballots immediately after the 60-day "securely preserved" period of Election Code Section 66.058(b). We submit to you this letter in favor of injunctive relief for the public through Texas Government Code 552.321, and we submit to you this letter in favor of meaningful public inspection of all computer software used to manipulate the votes of an election.

We believe each of these statements are ripe, justiciable, issues subject to public order by the Texas Attorney General's office and, if necessary, litigation in a court of law. We believe the public policy of Texas weighs heavily in favor of disclosure, as described herein, and we believe that the reasoning of previous letter orders and attorney general orders have become unjustified by current technology and the nature of how Texas presently conducts elections. Accordingly, we believe your office will review the orders cited herein and update the conclusions therein to reflect the current law and policy of the State of Texas.

Thank you for your attention to this important matter.

Kindest regards,

/s/ Chris N. Carlin

Chris Noel Carlin